

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

**PENNSYLVANIA INTERSCHOLASTIC
ATHLETIC ASSOCIATION, INC.**

Employer

And

Case 06-RC-152861

**OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION**

Petitioner

REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION

Pennsylvania Interscholastic Athletic Association (“PIAA” or “the Employer”) is a non-profit, Section 501(c)(3)¹ corporation whose primary purpose is to promote uniformity of standards in the interscholastic athletic competitions of its member schools. PIAA’s member schools include public and private schools at the junior high, intermediate, middle and high school levels, including charter schools. Approximately 1,611 schools within the Commonwealth of Pennsylvania are members of PIAA, about 197 of which are private schools.

Office and Professional Employees International Union (“the Petitioner”) filed a petition with Region Six of the NLRB on May 22, 2015, seeking to represent a unit comprised of all game officials who officiate at boys and girls lacrosse games within PIAA’s Districts VII and VIII. There are approximately 140 officials in the petitioned-for

¹ This designation is based on the Internal Revenue Code of 1986.

unit of lacrosse officials.² A hearing officer of the Board held a hearing in this matter on June 4 and 5, 2015, after which both parties filed timely briefs with me, which I have fully considered.

As established at the hearing and in the parties' briefs, the Petitioner and PIAA are in disagreement as to three fundamental issues. First, as a threshold matter, PIAA argues that the petition should be dismissed on the ground that PIAA constitutes a "political subdivision," which is exempt from the Board's definition of "employer" under Section 2(2) of the Act. The Petitioner disagrees with PIAA's position in this regard and maintains that the Board should assert jurisdiction over PIAA as a non-profit corporation that was created by private individuals, which is not administered by individuals who are responsible to public officials or the general electorate. The second issue raised by this proceeding is whether the petitioned-for lacrosse officials are "employees" within the meaning of Section 2(3) of the Act, or whether they are independent contractors, who are exempt from the Act's coverage. While PIAA contends that the lacrosse officials are independent contractors based on such factors as their method of compensation and their ability to reject assignments, the Petitioner asserts that the lacrosse officials are statutory "employees" whose essential terms and conditions of employment are established by, and under the control of, PIAA.

² Considering all PIAA-recognized sports, including lacrosse, there are about 2,500 officials who perform their duties at PIAA member schools located in District VII and about 300 officials working in District VIII. In total, there are approximately 14,000 registered officials within PIAA's state-wide territory. Many PIAA officials referee for more than one sport. Neither party has claimed that the petitioned-for unit of lacrosse officials in Districts VII and VIII should be expanded to include lacrosse officials from districts throughout the Commonwealth (a state-wide unit) or officials of all sports in Districts VII and VIII. Accordingly, I find it unnecessary to address these alternative units herein.

Finally, the third issue for consideration in this matter is, assuming that PIAA is deemed to be “an employer” under the Act and that the lacrosse officials are found to be “employees” under the Act, whether the petitioned-for unit is appropriate in light of the frequency and timing of the lacrosse officials’ work. While PIAA argues that the lacrosse officials work for such a limited period of time that they cannot qualify as “regular part-time employees,” the Petitioner disputes this claim and asserts that the Board should provide the petitioned-for employees with an opportunity to cast their ballots in a Board-directed election.³

I have thoroughly considered the record evidence and the parties’ arguments concerning each of these issues. As fully discussed below, I have concluded that PIAA is a private employer, not a political subdivision, within the meaning of the Act. Therefore, consistent with the U.S. Supreme Court’s seminal case concerning this issue, *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), I find that PIAA is not exempt from the Board’s jurisdiction.

Further, based on the evidence and reasoning set forth below, I have determined that the lacrosse officials whom the Petitioner seeks to represent in this matter are properly considered “employees” under Section 2(3) of the Act. While there are some factors that weigh in favor of finding the petitioned-for lacrosse officials to be independent contractors, when considered in the overall context of PIAA’s operations,

³ At the hearing the Employer additionally disputed the legality of the Board’s rule regarding representation cases which became effective April 14, 2015. Clearly this issue was not litigated, as the Board adopted the final rule changes, and this issue is not relevant to determining whether a question concerning representation exists.

the evidence supports a finding that they are in an employer-employee relationship with PIAA.

Finally, I find that the petitioned-for employees perform their work for a sufficient duration of time that the requested unit is appropriate and I shall direct that an election occur in that unit.

To provide a context for my discussion of these issues, I will first present an overview of PIAA's operations. I will then set forth in detail the facts and reasoning supporting each of my conclusions concerning the issues described above.

I. FINDINGS OF FACT

A. PIAA's Operations

1. Background

In 1913, a group of high school principals created PIAA as an entity that would establish and maintain consistency for interscholastic contests in the Commonwealth of Pennsylvania, by developing and administering standardized rules and procedures for various sports.⁴ PIAA's creation was purely private in nature, with no governmental dictate for its establishment or involvement in its operations.

In 2000, for reasons not set forth in the record, the Pennsylvania General Assembly passed the Interscholastic Athletics Accountability Act, also referred to as

⁴ During the fall season, PIAA-recognized sports include the following: Cross-Country; Soccer; Field Hockey; Tennis for girls; Football; Volleyball for girls; Golf; and Water Polo. Winter season PIAA-sponsored sports include: Basketball; Indoor Track and Field; Bowling; Rifle; Competitive Spirit; Swimming and Diving; Gymnastics; and Wrestling. During the spring season, PIAA-recognized sports include the following: Baseball; Softball; Golf; Tennis for boys; Volleyball for boys; Track and Field; Lacrosse for boys; and Lacrosse for girls. Boys and Girls Lacrosse did not become a PIAA-recognized sport until 2009.

“Act 91.” This state statute established the Pennsylvania Athletic Oversight Council (“the Council”). It additionally required PIAA to adopt 13 recommended regulatory reforms, including adherence to open meeting policies; competitive bidding processes for “nonincidental” merchandise and championship competition sites; establishment of an equal opportunity process; implementation of rules intended to discourage member schools from recruiting student athletes; adoption and adherence to a policy prohibiting conflicts of interest and establishing ethics rules; employment of in-house counsel; evaluation of its “contracted employees;” and no adoption of rules restricting media access to competitions or commentary by media representatives. Also included among the recommended reforms was a delineation of representative positions to comprise PIAA’s Board of Directors. Under Act 91, the Council was charged with monitoring PIAA’s compliance with the suggested regulatory reforms and if it determined that PIAA failed to adhere to the recommended changes, the Council was authorized to submit to the General Assembly of Pennsylvania a proposal for the selection of a “new entity to oversee the operation of interscholastic athletics in Pennsylvania.”⁵

Following the passage of Act 91, PIAA worked to meet the Council’s expectations by, inter alia, revising certain of its policies to provide for greater transparency and tightened budget and finance practices. In 2002, the Legislative Budget and Finance Committee issued a report delineating the extent of PIAA’s compliance with Act 91’s recommended regulatory reforms. It has not issued any

⁵ The statute did not call for an end to PIAA’s existence, only for the potential creation of a new entity.

additional reports concerning PIAA since that time. PIAA receives no funding from state, county or municipal sources.

The Council was sufficiently satisfied with PIAA's progress that it never resorted to proposing a new oversight entity, leaving PIAA in the same role that it had occupied since 1913. In 2004, the Council disbanded and was replaced by the Pennsylvania Athletic Oversight Committee ("PAOC"). Unlike the Council, the PAOC was not authorized to propose to the General Assembly a new entity for the interscholastic athletics oversight role. The PAOC, which is comprised of three members of the state Senate and three members of the state House of Representatives, is obligated to meet at least once a year to review PIAA's continued compliance with Act 91 and to issue a report of its findings. The record reveals, however, that while PIAA's Executive Director meets with the POAC annually and "testifies" before the committee (gives an oral presentation), POAC has not issued a written report concerning PIAA's Act 91 compliance since 2012.⁶

2. PIAA's Organizational Structure

The Board of Directors

PIAA provides oversight and membership services for all recognized school sports, including boys and girls lacrosse, to schools located throughout the Commonwealth of Pennsylvania. PIAA's organizational structure is dictated by its comprehensive Constitution. PIAA's state-wide organization is governed by its Board of Directors, of which there are 31 members. PIAA's Constitution sets forth the

⁶ The POAC has never asserted to the PIAA that the committee found PIAA's budget or finances to be problematic.

composition of the Board of Directors, specifically providing that the Board must include representatives of the following constituencies: parents of athletes (one male and one female, chosen by the Parents' Advisory Committee); private schools (one representative, chosen by the Private Schools' Steering Committee); school boards (two representatives, one of which is a current school board member, chosen from the Pennsylvania School Boards Association); school principals (one representative, chosen by the Pennsylvania Association of Secondary School Principals); girls' athletics (one representative, chosen by the Girls' Athletics Steering Committee); coaches (one representative, chosen by the Pennsylvania Coaches' Association); officials (two representatives, one male and one female, chosen by other officials through the Officials' Council); school administrators (one representative, selected by the Pennsylvania Association of School Administrators); Pennsylvania Department of Education (one representative, appointed by the Commonwealth's Secretary of the Department of Education); junior high/middle schools (one member-at-large, chosen from the District Committees); and senior high schools (one representative per 50 member schools in each district, selected from the District Committees). Eighteen of the Board's 31 members are in this latter category.

With the exception of the single member whom the Department of Education appoints to serve on the PIAA Board of Directors, there is no requirement in the PIAA Constitution and By-Laws that PIAA Board members must represent public, versus private, organizations or schools. The remaining members of PIAA's Board of Directors are selected from among various interest groups related to interscholastic sports,

including the Pennsylvania School Boards Association, Pennsylvania Association of School Administrators, Pennsylvania Association of Secondary School Principals, Pennsylvania State Athletic Directors' Association, Pennsylvania Coaches' Association Official' Council, Girls' Athletic Steering Committee, and the Parents' Advisory Committee. The record contains no evidence that governmental entities established, monitor or participate in these groups. Nor is there evidence that the groups are strictly inclusive of private vs. public school representatives.

All PIAA Board of Directors members have an equal (single) vote on matters before that body. The sole appointed representative of the Department of Education possesses no rights or duties greater than those of the remaining 30 Board members.

The PIAA Constitution grants to the Board of Directors the right to elect its own officers; interpret the Constitution and By-Laws; employ an Executive Director;⁷ administer the finances of the PIAA; and control Inter-District Championship contests. The Constitution further grants to the Board responsibility for determining the method of, and qualifications for, registration of the officials at issue herein, and for determining the officials' powers and duties, as well as making and applying policies, procedures, rules and regulations for the officials. PIAA's Board of Directors also develops the personnel policies for administrative PIAA staff members, who are described below.⁸ The Board of Directors has the authority to "fix and enforce penalties" for any violation of the PIAA

⁷ PIAA need not secure governmental approval for the Board of Directors' hiring or termination of the Executive Director.

⁸ There is no requirement for governmental approval of the personnel policies.

Constitution, By-Laws, policies, procedures, rules and regulations.⁹ PIAA Board of Directors members do not report to the PAOC or to any governmental entity.

PIAA's Administrative Staff

PIAA's daily operations are overseen by an administrative staff of 24 individuals. Currently, Robert Lombardi serves as PIAA's Executive Director and Patrick Gebhart is its Assistant Executive Director. Melissa Mertz holds the position of Associate Executive Director. Mark Byers is currently PIAA's Chief Operating Officer. Executive Director Lombardi reports directly to the Board of Directors, while the other executive employees report to Lombardi. These managers work at PIAA's headquarters office, which is located in Mechanicsburg, Pennsylvania.¹⁰ Ten other staff members, whose positions are not in issue in this proceeding, also report to the headquarters office.

Eleven additional paid staff members work in various PIAA district offices. Among these is the Executive Director of District VII (also called the "Western Pennsylvania Interscholastic Athletic League" or "WPIAL"), Timothy O'Malley. O'Malley and his administrative staff work at the District VII office, which is located in Pittsburgh, Pennsylvania. O'Malley is directly employed by PIAA, not WPIAL. O'Malley reports to Executive Director Lombardi.

⁹ For example, the PIAA By-Laws provide that the Board of Directors may remove from the list of registered sports officials any person whom the Board determines has been "biased and/or consistently incompetent or unfair in the official's decisions in Contests," those officials who have been convicted of honesty-based offenses and those who have been removed for misconduct by a national amateur or professional athletic organization or state high school organization that recognizes and/or registers sports officials. As described more fully below, the Board of Directors also authorizes the Executive Director to suspend sports officials for such infractions as repeated cancellations without consent of member schools.

¹⁰ The headquarters office is repeatedly referred to in the record as "the PIAA office."

The Districts and District Committees

For ease of management and administration, PIAA divides its organization among 12 different districts, which are based on geographical boundaries, and designated in PIAA's Constitution. District VII, in which the Petitioner seeks to represent the lacrosse officials, consists of schools located in all territory in Allegheny County that is outside the City of Pittsburgh, as well as Armstrong, Beaver, Butler, Fayette, Greene, Lawrence, Washington and Westmoreland Counties. District VIII, where the Petitioner also seeks to represent the lacrosse officials, consists of schools within the City of Pittsburgh boundaries. Officials are members of the districts in which they reside.¹¹

Each of PIAA's 12 districts is governed by a District Committee. PIAA's Constitution mandates that each District Committee must include the following voting members: at least one representative of the junior high/intermediate/middle schools, one representative of the School Boards in the district and one representative of the officials, as well as at-large members. PIAA requires the District Committees to elect their chairpersons by July of each year, absent which the President of PIAA's Board of Directors appoints a chairperson for the year.

¹¹ A specifically set forth in PIAA's Constitution and By-Laws, the remaining districts encompass the following Pennsylvania counties: **District 1** – Bucks, Chester, Delaware, and Montgomery; **District 2**– Lackawanna, Luzerne, Pike, Susquehanna, Wayne, and Wyoming; **District 3** – Adams, Berks, Cumberland, Dauphin, Franklin, Juniata, Lancaster, Lebanon, Perry, and York; **District 4** – Bradford, Columbia, Lycoming, Montour, Northumberland, Snyder, Sullivan, Tioga, and Union; **District 5** – Bedford, Fulton and Somerset; **District 6** – Blair, Cambria, Centre, Clearfield, Clinton, Huntingdon, Indiana, and Mifflin; **District 9** – Cameron, Clarion, Elk, Jefferson, McKean and Potter; **District 10** – Crawford, Erie, Forest, Mercer, Venango, and Warren; **District 11** – Carbon, Lehigh, Monroe; Northampton, and Schuylkill; and **District 12** – Philadelphia.

The PIAA Constitution grants to the District Committees “general control within the District over all interscholastic athletic relations and Contests in which a PIAA member school participates, subject to the provisions of the rules and regulations of the Board of Directors.” The District Committees develop and maintain their own budgets and are responsible for administering their own finances. District Committees investigate and hear disputes between and among member schools within their districts. They are also authorized to fix and enforce penalties for violations of the PIAA Constitution, By-Laws, policies and procedures, rules and regulations that arise in their districts. Further, District Committees are responsible for making determinations as to the eligibility of contestants for PIAA competition. In District VII, WPIAL Executive Director O’Malley works alongside the District Committee in monitoring adherence to the PIAA Constitution and By-Laws, rules and regulations, policies and procedures.

Each District Committee selects one male and one female official to represent that district on the Officials’ Council, a state-wide group of officials. Finally, as noted above, the District Committees select 18 of PIAA’s 31-member state-wide Board of Directors.

PIAA Member Schools

PIAA membership is open to all public and private high schools, intermediate schools, junior high schools and middle schools which are either accredited by the Pennsylvania Department of Education or otherwise meet PIAA’s membership requirements. A school seeking membership in the PIAA must submit an application to the PIAA District Committee in which the school is located. The application must be

signed by the principal of the school and accompanied by annual dues.¹² PIAA also requires its member school applicants to sign a resolution acknowledging that the PIAA Constitution and By-Laws, policies and procedures, rules and regulations will govern the school's interscholastic athletics.

Once PIAA has accepted a school's membership application, PIAA dictates the school's rights and obligations related to the school's PIAA-recognized sports. PIAA similarly has the power to abolish a member school's designation as a "PIAA school" and preclude that school from participating in PIAA sports programs if that school violates the PIAA Constitution or its PIAA-dictated rules and procedures. For example, the PIAA Constitution mandates that member schools must sponsor at least one team. If a member school ceases to sponsor at least one team, that school's PIAA membership "shall" be terminated. According to PIAA's By-Laws, at Article XIII, "All PIAA member schools are required to cooperate fully with PIAA District Committees, Regional Panels and/or the PIAA Board of Directors...to further the objectives of the PIAA and to investigate incidents relating to disciplinary matters and application of the PIAA Constitution, By-Laws, Policies and Procedures and/or Rules and Regulations." A school that has been expelled from membership in PIAA may not apply for readmission for three years following the expulsion.

The record indicates that member schools work with each other to devise game schedules, including those for lacrosse, during the regular playing season. PIAA grants

¹² The PIAA Board of Directors establishes the dues structure for member schools, which are based on enrollment numbers for the schools.

to its member schools the right to contract with individuals to perform the specific task of scheduling sports officials to referee at the schools' regular season interscholastic games.¹³ Commonly referred to as "Assignors," these individuals are also officials.¹⁴ Member schools pay the Assignors for their services. The record indicates that while Assignors are generally elected to their position by fellow officials within each chapter, groups of member schools, through their athletic directors, may also directly hire independent Assignors. In performing their tasks associated with assigning officials to PIAA games during the regular season, the Assignors have access to PIAA game schedules, contact information for officials and a scheduling software program called "Arbiter," which I describe more fully below.

PIAA requires that member schools' principals or athletic directors personally sign all contracts, including those between the school and the PIAA and those between the member school and the officials. PIAA provides the member schools with all of the forms that are used in connection with PIAA-registered sports competitions, including the contract for officials.

Chapters

Within each of the 12 districts designated by the PIAA Constitution, PIAA-registered officials, including the lacrosse officials at issue herein, are organized into "chapters." The chapters are comprised of officials involved in a single designated sport, divided according to geographical considerations. According to record

¹³ As described more fully below, PIAA directly schedules the lacrosse games for post-season (playoff) contests. PIAA also directly selects and assigns lacrosse officials for the post-season games.

¹⁴ The record does not reveal whether the Assignors continue to serve as officials while also working as Assignors.

testimony, the officials in a chapter “join together to study the rules and go over interpretations,” with a goal of consistently applying the contest rules. Officials need not reside in the area where the chapter is located; rather, they join chapters where they wish to officiate, even if those chapters are in areas outside of the districts in which they reside. Both District VII and District VIII have one boys lacrosse chapter and one girls lacrosse chapter within their respective geographic areas.

In order to form a chapter, a group of 15 or more officials from a defined geographic area who are interested in refereeing at contests for a particular interscholastic sport submits an application for chapter formation to the District Committee representative in the district in which the group wishes to officiate. If the proposed chapter meets the PIAA requirements for formation, the PIAA Executive Director issues an official charter to the chapter. The charter is signed by the President of the PIAA Board of Directors, as well as the PIAA Executive Director. New chapters are chartered when it is “deemed necessary in order to meet the service demands of prescribed areas on a statewide basis.”

Each chapter is governed by the “Constitution and By-Laws of the Pennsylvania Interscholastic Athletic Association, (PIAA) Chapters of Registered Sports Officials” (“Chapter Constitution”). Chapters are required to adopt the Chapter Constitution “verbatim;” they are not permitted to modify its terms in any manner. The Chapter Constitution may be amended at any time by majority vote at any meeting of the PIAA Board of Directors.¹⁵ The final interpretation of the Chapter Constitution lies with

¹⁵ The PIAA Board of Directors last revised the Chapter Constitution in 2003.

PIAA's Executive Director. The Executive Director may abolish a chapter if he deems that it has not adhered to PIAA's Constitution and By-Laws.

The purposes of the chapter, as set forth in Article II of the Chapter Constitution, are as follows: to unite "under a common bond" PIAA-registered officials into a unified statewide organization; to study appropriate contest rules and progressively improving the quality of sports officiating through the study of "approved mechanics;" to promote and maintain a code of officiating ethics, progressively improving and elevating the officiating standards of the PIAA and maintaining the "integrity of the high competitive ideals of the PIAA;" and to render more efficient service to the member schools.

According to the Chapter Constitution, a charter may be revoked if a PIAA chapter fails to fulfill one or more of the purposes set forth in Article II of that document and/or if a chapter whose charter was granted solely on the possibility of growth does not demonstrate such growth within 18 months from when the charter was issued.

All registered PIAA officials are required to affiliate with one of the established chapters within 15 days of their approved registration with the PIAA, described below. Officials who wish to transfer from one chapter to another must secure written approval of PIAA's Executive Director, though if an official is moving out of his or her geographical area, the two affected chapters can reach agreement on the transfer.

The Chapter Constitution additionally specifies that the "PIAA Office" is responsible for codifying and promulgating the rules and regulations for chapters, as guided by the PIAA's Constitution and decisions by its Board of Directors. Each chapter elects its own President, Vice President, Secretary and Treasury (or Secretary-

Treasurer) and Interpreter.¹⁶ These officers, along with at least two other members of the chapter, constitute a Chapter's Executive Committee.

In order to maintain its charter, each chapter is required to meet at least eight times during its specific sport season. The Chapter Constitution dictates the recommended length of these meetings, as well as the order of business. Chapter Secretaries are responsible for keeping attendance records for each Chapter meeting, for the purpose of establishing that each official has met the PIAA-mandated requirement that each official attend a minimum of six chapter meetings per sports season. The Chapter Secretaries are required to submit to the PIAA Executive Director the names of all officials who attend fewer than six chapter meetings per sports season, as well as an "End of Year Chapter Report." Upon request, the Chapter Secretaries must also provide the PIAA executive staff with reports concerning "any matter of chapter business" or the status of any of its members.¹⁷

The Officials' Council

The elected sports officials who serve as the "officials' representatives" on their respective District Committees (one male representative official and one female representative official) comprise the state-wide Officials' Council. Thus, the Officials' Council is not sport-specific, but includes officials who referee at all sorts of PIAA-recognized sports. The 24-member Officials' Council, which meets twice yearly, exists to provide a representative voice for the officials.

¹⁶ Interpreters are those charged with interpreting rules of the game as they apply to actual play.

¹⁷ It appears that the Chapter Secretary may also serve as the Assignor for the chapter.

3. PIAA-Provided Services

Generally speaking, the primary service that PIAA provides in exchange for its member schools' dues is a structure for consistency within interscholastic sports. More particularly, PIAA provides its member schools with an array of resources concerning the various types of sports competitions that PIAA recognizes. Chief among these resources is the PIAA Handbook, which includes detailed policies and procedures, rules and regulations, guidelines for sports medicine, a code of ethics and the forms that PIAA requires member schools to use for compliance with PIAA's Constitution and By-Laws.¹⁸ PIAA is also responsible for establishing, coordinating and administering all post-season playoff games, including assignments and compensation for officials, as described below.

PIAA determines the dates by when its member schools may begin practicing in each sport, including lacrosse, and it establishes the minimum length of preseason practice. Similarly, PIAA dictates to the member schools the maximum length of the regular season in each sport; the earliest date on which regular season contests can begin; the maximum number of regular season games that will be played in each sport; the date by which the regular season will end and the date by when the District playoff games will be completed.

PIAA additionally provides member schools with access to its pool of registered sports officials in each PIAA-recognized sport, along with assurances that the officials are bound by the same Constitution and By-Laws, policies and procedures, code of

¹⁸ The PIAA Handbook also contains copies of the PIAA Constitution and By-Laws.

ethics and rules and regulations as are the member schools. PIAA conducts testing for officials, to ensure that they are knowledgeable about the sports they seek to referee. PIAA makes available to its member schools several standardized forms, including contracts and evaluation forms, which athletic directors, coaches and other officials can use to assess the officials' skills and competence during regular season play. In essence, PIAA provides to the member schools a guarantee that the PIAA officials whom the schools use are qualified and fit for service. This guarantee is enforced through PIAA's ability to reject officials' applications and to suspend, place on probation and/or remove any official who does not comply with PIAA's Constitution and rules.

During the regular sports season, which last seven weeks for boys and girls lacrosse, member schools receive their assigned officials for each game through a combination of the automated Arbiter system and the coordination efforts of the Assignors. Once the regular season schedule is published, Assignors communicate with officials to determine the officials' availability for specific contests and to convey the fee(s) the member schools agree to pay for those assignments.¹⁹ If officials are unable to appear for a game that they have previously agreed to referee, as in the case of illness, they must contact the Assignor, who then communicates with other officials in order to find a replacement official.

Following the conclusion of the seven-week regular season, the playoff season begins, first at the district level and then between districts. PIAA derives the vast

¹⁹ The record is unclear as to the extent to which, if any, Assignors may affect the fees (see discussion below concerning officials' compensation).

majority of its income from ticket and merchandise sales for the post-season games.

PIAA-provided services to the member schools also change at that point. First, PIAA establishes and publishes the schedule for the playoff games. Also, Assignors are not involved in scheduling officials for post-season playoff games. Rather, the PIAA directly selects the officials for use at district and inter-district competitions.²⁰ PIAA additionally evaluates officials on their performances during the playoff (post-season) games.

Further, PIAA directly compensates the lacrosse officials for work performed during the post-season games.

B. The Officials' Duties and Terms and Conditions of Employment

PIAA sets forth the detailed responsibilities, terms and conditions of employment for its officials in the PIAA Officials' Manual. This comprehensive publication contains a section entitled, "Explanation of Officials' Policies, Procedures, and Requirements," which includes such items as the application procedure, dues, causes for suspensions, reinstatement of suspended officials, uniforms and causes for probation. The Officials' Manual also includes a copy of the Chapter Constitution and By-Laws and "Excerpts from the PIAA Constitution and By-Laws That Pertain to Officials." The Officials' Manual also contains a section entitled, "Excerpts from PIAA's Policies and Procedures That Pertain to Officials." Such policies include the assignment of officials, evaluations and fees.

²⁰ PIAA bases its post-season assignment of officials, at least in part, on evaluations of the officials' performance during the regular season. The regular season performance evaluations are prepared by coaches, school athletic directors and other officials and submitted to the PIAA executive staff by the District Committees.

Becoming a PIAA Official

To become a PIAA official, one must be either a high school graduate or 18 years old. PIAA also requires that applicants be “of good moral character” and that they meet all requirements established by the PIAA’s Board of Directors. New applicants must complete an “Application for Registration” form, along with a non-refundable fee of \$30.00. Applicants may only apply for a maximum of two sports on the Application and Registration form. Those who wish to be registered in a third sport must submit a separate form and application fee for that sport.

PIAA provides testing for official applicants on four testing dates throughout the fall, winter and spring, and at the annual Officials’ Convention in the summer. The tests are administered by PIAA District officials’ representatives, or their designees, at sites selected by PIAA. Examinees must receive a score of 75% or better on the examination in order to receive PIAA registration in the sport.

Applicants who pass the exams must receive these items from PIAA’s executive staff prior to accepting any assignments to officiate: a letter indicating that the applicant has successfully passed the examination and is now considered a PIAA-registered official in the sport; an Official’s identification card; and a PIAA Official’s emblem, to be placed on the official’s uniform.²¹ Once PIAA notifies the applicant that he or she has passed the exam(s) and registration is approved, the official must become affiliated with a PIAA locally chartered chapter in the individual’s sport within 15 business days. Failure to comply with this affiliation requirement will result in suspension. Every PIAA-

²¹ Applicants whose exam scores are below 75% may re-take the exam during the one-year period from the date the application for registration was filed.

registered official is required to be a member of a chapter in each sport in which the individual is registered, though officials are prohibited from maintaining membership in two or more chapters in the same sport.

As previously noted, PIAA's Executive Director has the right to reject any potential official's application. If the Executive Director rejects an application, the applicant may file an appeal with the PIAA Board of Directors.

Remaining a PIAA Official

In order to remain a PIAA official, one is required to attend at least six chapter meetings during the course of a sport's season. Failure to comply with the meeting requirement will result in suspension unless the chapter or the PIAA Executive Director accepts an excuse for the absence(s). "Attendance" means physical presence for the entire meeting.

According to the Officials' Manual, a "primary requirement" of all PIAA-registered sports officials is to attend the annual rules interpretation meeting. Each chapter is obligated by the Chapter Constitution to hold such a meeting, the apparent purpose of which is to make certain that everyone who is involved in a PIAA sport is up-to-date on all rules, interpretations of those rules, and policies concerning that sport. Officials who do not attend their chapter's rules interpretation meeting may attend the one held at the Officials' Convention, instead, or take the online version of the meeting for a fee. Only the PIAA executive staff may excuse an official's failure to attend an annual rules interpretation meeting and the acceptable reasons for absence are limited to those circumstances that are "absolutely unavoidable" such as illness of the official or illness

or death of his/her immediate family member. Failure to attend a rules interpretation meeting without an “acceptable” excuse results in a one-year suspension.

To remain a PIAA-registered official, one must also remit to the PIAA dues in the amount of \$45.00 by February 28 of each year (or February 29, in the case of a leap year). Those who submit their dues prior to January 15 may pay a reduced rate of \$40.00. Officials who do not remit dues by February 28 or 29 will be assessed a penalty fee of \$25.00. Any official who does not remit the dues and the penalty fee by March 31 will be suspended for one year. To be reinstated, an official must pay \$75.00. Similarly, officials are required to pay any dues assessed by their respective chapters, absent which the Chapter Secretary may recommend to PIAA’s Executive Director that the delinquent official be suspended. Officials who comply with PIAA’s testing requirements, rules regarding attendance at meetings, annual dues submissions and other obligations under the PIAA Constitution and By-Laws may continue to serve as PIAA referees for an unlimited number of years. The officials’ annual dues represent a small portion of PIAA’s revenues.

Assignment of Officials to Sports Contests

As mentioned above, PIAA officials, including those whom the Petitioner seeks to represent in this matter, receive their assignments through a multi-faceted process. Initially, officials are given access to the Arbiter computer program, which they use to indicate their availability for certain contests and their unavailability for others.²² Once

²² Officials are permitted to maintain outside employment, which may render them unavailable for certain PIAA competitions.

the regular season schedule is confirmed, the Assignors, who also have access to the Arbiter program, use the officials' entries to help assign specific games to specific officials.²³ Officials may decline regular season assignments if they wish, without receiving any mandated penalties for doing so.

In the post-season, PIAA determines all locations and starting times of the district and inter-district contests and then Assistant Executive Director Pat Gebhart assigns the officials for the games. He does not use the Arbiter system in making the assignments, but relies on regular season evaluations and recommendations from coaches, athletic directors and other officials concerning the official's ability to handle post-season officiating assignments. In order to be considered for assignment to inter-district games, lacrosse officials are also required to attend the PIAA convention once every five years. While officials may decline PIAA game assignments in the post-season, doing so will likely diminish the declining official's chances of being chosen for subsequent post-season games.²⁴

PIAA determines the lacrosse officials' overall schedule, by establishing the earliest date on which regular season contests can begin and the dates by when regular season and playoff season contests must end. Officials have no ability to alter the season schedules and they must perform their PIAA job duties during the PIAA-mandated period. The time required for the performance of the lacrosse officials' on-

²³ District VII has a total of three Assignors for lacrosse: one for the boys lacrosse chapter and two for the girls lacrosse chapter.

²⁴ During the most recent PIAA lacrosse season, PIAA's Assistant Executive Director made 42 direct assignments for lacrosse officials during the post-season. Of this number, six were for boys lacrosse officials in District VII and six were for girls lacrosse officials in District VII. PIAA filled the remaining assignments with officials outside of Districts VII and VIII, from other parts of the Commonwealth.

field duties is dictated by PIAA's rules, including those that they adopted from the National Federation of State High School Associations ("NFHS") and modified for use with lacrosse. Officials may not shorten or lengthen the assignment; nor may they hire someone to perform an assignment on their behalf.

Officials' Uniforms and Equipment

All PIAA officials are required to wear identical uniforms that consist of black pants and black and white striped shirts, which they purchase on their own.²⁵ Officials must display the PIAA emblem or patch on these uniforms. They are prohibited from displaying other types of patches on their uniforms, with the exception of a small American flag, the size of which PIAA dictates.

Officials supply their own equipment such as whistles, penalty markers, a timing device, a card, a hat, and a pencil. These uniform and equipment requirements are mandated by PIAA's Officials' Manual. PIAA rules also prohibit the officials from wearing any jewelry other than wedding bands and medical alert identification items, including personal wrist watches, and from using tobacco.

PIAA issues to its officials, including the lacrosse referees, identification cards that bear the PIAA logo. The identification cards contain a statement regarding sportsmanship that the officials are required to read aloud to game participants. The cards also contain a statement declaring that the bearer of the card is not an employee

²⁵ While the Officials' Manual does not require that the officials purchase their uniforms from any particular vendor, the PIAA website, www.piaa.org, contains a link for "official's merchandise," which leads directly to the commercial website for a single vendor called, "Officially Sports."

of the PIAA, or of the Assignors, but is an independent contractor. The identification cards are treated as a part of the officials' required uniform.

Job Duties and Supervision

The lacrosse officials' job duties are entirely controlled by PIAA's Constitution and By-Laws, Policies and Procedures and Rules and Regulations. Officials must consult and adhere to a published rule book when carrying out their job tasks.²⁶ Deviation from those rules can result in suspension, probation or removal from PIAA, as described above.

Lacrosse officials receive additional direction concerning their job duties and performance from PIAA-mandated rules interpretation meetings, sport-specific bulletins that PIAA distributes to officials, and through training at the chapter level. There are no designated supervisors who work on the game fields with the officials, but PIAA Assistant Executive Director Gebhart is responsible for day-to-day oversight of the officials' compliance with PIAA's rules and procedures.²⁷ During the post-season, officials call off directly to the PIAA Assistant Executive Director if they intend to miss an assigned game.

Coaches, athletic directors, District Committee members and even other referees, use PIAA's evaluation mechanism to provide feed-back to the officials concerning their job performances. During the post-season, PIAA's Assistant Executive

²⁶ The rule books are sport-specific and are based on those that PIAA adopted from NFHS. PIAA modified the NFHS rules for use in lacrosse contests. PIAA reinforces the rules through distribution of preseason bulletins that PIAA distributes to its officials, including the lacrosse officials at issue herein.

²⁷ PIAA Assistant Executive Director Gebhart, who testified at the hearing in this matter, described his "primary responsibility" as being "the supervisor of officials."

Director also uses PIAA's evaluation system to review the job performances of the petitioned-for lacrosse officials. If officials believe that they have been discriminated against in some fashion, they may either file their complaints with the Officials' Representative in their district, or directly with the Assistant Executive Director.

The officials' interpretations of PIAA-adopted rules on the field, as well as the officials' conduct off the field, are reviewable by the PIAA through a complaint process set forth in PIAA's rules. Questions regarding officials' performance must be submitted in writing to PIAA's executive staff. PIAA may then require the subject official to submit a report to the PIAA executives in response to the inquiry.

In the event that an official disqualifies a coach or a player during a game, the official is required to file a report with PIAA within 24 hours of the incident, explaining his or her actions.²⁸ The record contains evidence that PIAA's Assistant Executive Director follows up with the official after submission of the disqualification report, to further investigate the official's action and/or provide feedback concerning his or her performance. During the most recent season, District VII lacrosse officials filed a total of eight disqualification reports with the PIAA executive office.

Officials' Compensation and Benefits

As noted above, PIAA member schools are responsible for compensation of the sports officials during the regular season. According to PIAA's Policies and Procedures, PIAA does not grant to member schools the right to set maximum fee rates for the

²⁸ As with all documents that officials use in the performance of their duties, PIAA provides the lacrosse officials with the disqualification report form that they are required to use.

officials; nor does PIAA grant to the PIAA officials the right to set a minimum fee rate. Athletic directors of member schools may collectively seek to lower the officials' fees, however, and there is evidence that they have done so in the recent past. Conversely, officials, through their chapter leaders or the Officials' Representatives to the District Committees, may seek to increase officials' fees.

During the regular season, fee disputes between lacrosse officials and members schools are initially mediated by the Officials' Representative on the District Committee. If those efforts are unsuccessful, the officials may request a hearing before the entire District Committee. PIAA's executive staff may attempt to assist the member schools and officials in reaching an agreement on fees, by encouraging them to engage in discussions that will lead to an agreement.

When assignments become available during the regular season, officials are permitted to decline those assignments if they believe that the proffered fees are unacceptable. The officials' overall compensation for an entire season of PIAA-sponsored games varies, depending on the number of assignments each official accepts and the type of assignments. For example, officials can earn more money if they accept assignments that combine junior varsity games with varsity games. During the regular season, when member schools pay the officials, no withholdings are taken from the officials' checks for income taxes or Social Security.

Officials are required by PIAA to execute a written contract with a member school for each regular season assignment. Absent such execution, the official will not be paid for the assignment. PIAA also requires that the contract be executed by a

representative of the member school hosting the game. The subject contract is among the forms that PIAA distributes to its member schools and officials. Like the PIAA-issued identification card, the contract that PIAA provides to member schools for use with the officials contains language declaring that the official is an independent contractor.

The schools hosting the games are responsible for making the payments to officials during the regular season, as dictated by PIAA's Policies and Procedures. Host schools are required to compensate the officials prior to the beginning of all regular season contests. The record indicates that officials receive, on average, about \$70.00 per varsity game for officiating during the regular season.²⁹

During the post-season, the compensation scheme changes. PIAA sets the fees that officials receive for district and inter-district games during the post-season. PIAA directly pays the petitioned-for officials for district and inter-district games, through its executive staff. The fees that officials receive for post-season games are higher than those they receive during regular season games.³⁰ In the post-season, as in the regular season, officials are paid on a per-game basis. Post-season payments from PIAA to the officials contain no withholdings for income taxes or Social Security.

²⁹ The record does not reveal where the compensation scale for officials originates, only that the member schools' representatives and the officials' representatives negotiate fees during the regular season and that PIAA sets the scale during the post-season.

³⁰ The basic fee for officiating at a post-season varsity game appears to be about \$80.00.

PIAA provides officials with liability insurance, excess accident medical insurance and accidental death and dismemberment insurance.³¹ It does not provide the officials with regular medical insurance, Workers' Compensation insurance or Unemployment Compensation insurance. Nor does PIAA provide the officials with sick leave, vacation days, or personal leave days.

Suspension, Probation and Removal of PIAA Officials

PIAA's Board of Directors may, at its discretion, remove an active official from PIAA's list of registered officials if the Board determines that the official was biased and/or consistently incompetent. The Board may also remove an official if, according to the Board's assessment, the official's conduct on or off the competition surface renders the official "unfit" and/or if the official is convicted of a crime involving honesty. Once removed, the offending official must wait five years before reapplying to become a PIAA-registered official.

As described above, PIAA's Executive Director may suspend officials for various violations of the Handbook, including repeated cancelation of contracts (scheduled assignments) without the member school's consent. A suspended official must submit a new application, accompanied by a \$30.00 registration fee. The suspended official must re-take the examination in the sport he or she seeks to referee and receive 75% or better as a score on the exam in order to be reinstated as a PIAA official.

PIAA's Executive Director may also place on probation those officials who, inter alia, fail to wear the required uniform, cancel a scheduled assignment without the

³¹ A portion of the officials' annual dues is used for the purchase of the PIAA-provided liability insurance.

consent of the member school, and/or those who have been accused of being biased and/or “palpably unfair” in decisions in a contest. Placement on probation excludes officials from eligibility for assignment to district or inter-district contests.

PIAA recognizes an “inactive” status for officials, not to exceed two years, based on health, employment or the official’s moving from the state. The Executive Director is empowered to extend the two-year inactive status, due to “extenuating circumstances.” Officials must continue to pay their annual PIAA registration fees, even while on inactive status. They are not permitted to officiate at any PIAA contests when designated as inactive and violation of this prohibition may result in suspension by the Executive Director.

II. ANALYSIS

A. PIAA is an “Employer” Within the Meaning of the Act

The threshold issue in this case is whether the Board has jurisdiction over PIAA, or whether PIAA constitutes a “political subdivision” that is explicitly excluded from the Act’s coverage.³² The Act itself does not define “political subdivision,” but Congress’ statement of its purposes for passing the statute, set forth in Section 1, is instructive for determining questions of jurisdiction like the one present in this case. Specifically, Congress declared that it is the policy of the United States to encourage the practice and procedure of collective bargaining and the “exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,

³² Section 2(2) of the Act, in pertinent part, excludes from the definition of “employer” the United States “or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof.”

for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. Sec. 151. It has long been established that in passing the Act, Congress vested in the Board “the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.” *NLRB v. Reliance Fuel Oil Corp.*, 371 US 224, 226 (1963).

In evaluating whether an employing entity constitutes a political subdivision that is excluded from the Act’s coverage, the Board has consistently applied the test that the Supreme Court established almost four decades ago in *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). Under *Hawkins County*, the political subdivision exemption is limited to an entity that is either 1) created by the state, so as to constitute a department or administrative arm of the government, or 2) administered by individuals who are responsible to public officials or to the general electorate. *Hawkins County*, 402 U.S. at 604-605. The Board will look to the “actual operations and characteristics” of the subject entity when assessing the *Hawkins County* factors and it will not assert jurisdiction over entities if they satisfy even one prong of the *Hawkins County* test. *Id.* at 603-604. Included among the entities for which the Board has declined to assert jurisdiction under the *Hawkins County* criteria are, for example, are a state bar association,³³ a medical hospital and its clinics,³⁴ and the trust for a public zoo.³⁵

³³ *State Bar of New Mexico*, 346 NLRB 674 (2006) (Board overturned Regional Director’s Decision and found that the bar association was a political subdivision because it was directly created by the state as an administrative arm of the state’s judicial branch).

³⁴ *Regional Medical Center at Memphis*, 343 NLRB 346 (2004) (Board upheld Administrative Law Judge’s dismissal of a complaint against a hospital deemed to be a political subdivision because its board members were responsible

The Board has consistently held that entities created by private individuals as nonprofit corporations are not exempt from the Act's coverage under the first prong of the *Hawkins County* analytical test. *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41, slip op. at 6 (2014) (Board overturned Acting Regional Director's determination that entity operating a charter school was a political subdivision exempt from the Act's coverage, as Section 2(2) does not remove from the Board's exemptions private entities acting as contractors for the government).

Here, PIAA contends that it meets both prongs of the *Hawkins County* political subdivision test and that it is, therefore, excluded from the Act's jurisdiction. Contrary to PIAA, the Petitioner argues that PIAA falls within the Act's coverage because it fails to meet either prong of the *Hawkins County* test.

Applying the first analytical prong of the *Hawkins County* test to the facts of this case, it is undisputed that a group of private individuals (school principals) created PIAA in 1913. There is no evidence that PIAA was formed at the direction of a governmental body. Nor is there a dispute that in 1978, PIAA was incorporated under Pennsylvania law as a nonprofit corporation.³⁶

to the mayor and the county commissioners, its operating budget was funded by county fees and property taxes, and its budget required approval by the county commission).

³⁵ *Oklahoma Zoological Trust*, 325 NLRB 171 (1997) (Board upheld Regional Director's dismissal of a petition where the trust was administered by individuals who are responsible to both public officials and the general electorate).

³⁶ Petitioner filed a post-hearing Motion requesting that I take administrative notice of PIAA's Articles of Incorporation, dated September 12, 1978 (the date on which PIAA became incorporated as a non-profit entity). I hereby grant that Motion. I have considered the publicly available document, though I note that PIAA's incorporation as a non-profit is not in question. The Board applies the *Hawkins County* test to both nonprofit and for-profit corporations alike. See, e.g., *Regional Medical Center at Memphis*, supra, and *Chicago Mathematics & Science*, supra.

PIAA argues that despite its undisputed creation by private individuals, PIAA meets the first prong of the *Hawkins County* test because the Pennsylvania General Assembly effectively “re-created” PIAA in 2000, by “extensively” modifying PIAA’s structure and operations through the passage of Act 91. Specifically, PIAA notes that the legislation mandated, inter alia, the following changes to the nonprofit corporation’s manner of doing business: instituted a requirement that PIAA’s Board of Directors be comprised of specifically identified representative types, such as parent and school administrators; established an Oversight Council for the purpose of reviewing PIAA’s operations; mandated compliance with the Pennsylvania Sunshine Act’s open meeting requirement, as well as its Equal Rights Amendment (ERA); and instituted a requirement that PIAA’s Executive Director provide an annual report concerning the nonprofit corporation’s compliance with the recommended reforms in Act 91.

I reject PIAA’s contention that Act 91 amounted to a re-creation of PIAA so as to satisfy the first prong of the *Hawkins County* test. While it is true that Act 91 “deals with interscholastic athletics accountability,”³⁷ the subject modifications were purely regulatory in nature and did not amount to the formation of a new corporation. The Board considered similar circumstances in *Chicago Mathematics*, infra. There, too, private individuals created a nonprofit corporation that only subsequently became subject to extensive state regulation and mandatory cooperation with Chicago Schools. The Board specifically found that the nonprofit in that matter failed to meet the first prong of the *Hawkins County* test because “no conduct on the part of the State of Illinois

³⁷ 24 P.S., Section 1601-A (2000).

was required to bring it into existence.” *Chicago Mathematics*, 359 NLRB at slip op. 7. Noting the absence of any legal support for PIAA’s argument that the Commonwealth “re-created” the organization through Act 91 in a manner to satisfy the first analytical prong of the *Hawkins County* test, I find that PIAA is not excluded from the Act’s coverage on that basis.

Turning to the second prong of the *Hawkins County* test, the question is whether PIAA is administered by individuals who are responsible to public officials or to the general electorate. *Hawkins County*, 402 U.S. at 605. In determining if an entity is “administered by” individuals who are responsible to public officials or the electorate, the Board examines whether a majority of the individuals who administer the entity are appointed by, or can be removed by, public officials. *Chicago Mathematics*, slip op. at 9-10. The Board consistently asserts jurisdiction in cases where public officials have no role in the selection and/or removal of an employer’s officers or directors.³⁸

As with the first prong of the test, PIAA contends that when Pennsylvania’s General Assembly passed Act 91, PIAA became an entity that is “administered by” individuals who are responsible to public officials or to the electorate. The record does not support this contention. First, while Act 91 outlines the types of representative positions that should comprise PIAA’s Board of Directors, only one of the 31 positions on the Board of Directors is reserved for a political appointee; that is, the Board member who is selected by the Commonwealth’s Secretary of Education. That single Board Member has no more voting power than any other other Board Members. Nor does the

³⁸ See, e.g., *Research Foundation of City Univ. of N.Y.*, 337 NLRB 965, 969-970 (2002) (Board asserted jurisdiction where none of the employer’s board members was appointed, or subject to removal by, public officials)

single public appointee have any special authority over the petitioned-for lacrosse officials.

The remaining 30 members of PIAA's Board of Directors are selected by their respective interest groups and the District Committees for the districts in which they reside. There is no evidence or suggestion in the record that the groups from which the remaining Board members are selected are themselves public entities or that they were created and formed at the behest of the government. Thus, the outstanding Board positions can be filled by representatives who are associated with private, as well as, public schools.

PIAA's Executive Director, who also participates in the administration of the organization, is similarly beyond the control of public officials and/or the electorate. The Act 91 reforms specify that PIAA's Board of Directors, which I have already determined lies outside of public control, is responsible for hiring and removing the Executive Director. In these circumstances, it cannot be established that a "majority of the individuals who administer the entity" are appointed by and subject to removal by public officials.³⁹ Id.

In support of its position that the instant petition should be dismissed for lack of jurisdiction, PIAA additionally argues that Act 91 "established a rigorous set of standards PIAA would have to meet, and threatened the very abolishment of PIAA if

³⁹ Compare, *Temple University*, 194 NLRB 1160, 1161 (1972) (Board found school to be a political subdivision and declined to assert jurisdiction where one-third of its governing body was appointed by Pennsylvania's governor and legislative officials and three additional positions were filled by public officials. Had Pennsylvania's General Assembly intended to re-establish PIAA as a public entity with Act 91, it could have similarly mandated that PIAA's Board of Directors be appointed by the governor and legislature. It did not.

those standards were not met.” (PIAA Post-Hearing Brief, pp. 28-29).⁴⁰ To the extent that the “rigorous” standards include compliance with state laws such as the Sunshine Act and the ERA, such mandated compliance does not render an entity an administrative arm of the Commonwealth. See, e.g., *Chicago Mathematics*, 359 NLRB No. 41 at 2-3 (Board held that entity was not a political subdivision notwithstanding it was subject to the same laws as public schools, including the state’s freedom of information law, open meeting laws, health and safety laws, the state labor relations law, and state laws regulating teacher assessments and certifications). Indeed, all corporations, whether for-profit or not-for-profit, are subject to state and federal regulations, such as those used for taxation purposes, banking regulations and environmental safety. Adherence to these regulatory laws simply does not render corporations extensions of the state or federal governments and PIAA has supplied no legal authority in support of its position to the contrary. *Id.* at fn. 28.

PIAA further contends that evidence of PIAA’s status as a political subdivision lies in the fact that it falls within the purview of other state entities. More particularly, PIAA notes that Petitioner sought and obtained information about PIAA through Pennsylvania’s Right-to-Know Law. PIAA similarly argues that the Board should decline jurisdiction in this case because the Pennsylvania Labor Relations Board, a state governmental entity that addresses representation matters and unfair labor practices

⁴⁰ For the sake of clarity I note that Act 91 did not actually “threaten to abolish” PIAA, as PIAA now claims. Rather, as described above, the legislation authorized the Oversight Council to submit to the General Assembly of Pennsylvania a proposal for the selection of a new entity to oversee the operation of interscholastic athletics in Pennsylvania. The Council never submitted such a proposal and then it disbanded. Act 91 did not authorize the Oversight Committee, which succeeded the Oversight Council, to propose a replacement entity. Thus, there exists no legislatively mandated means of “abolishing” PIAA.

involving public employers, has previously asserted jurisdiction over PIAA. Neither argument is persuasive. The Board has held that “while such State law declarations and interpretations are given careful consideration..., they are not necessarily controlling.” *Hawkins County*, 402 U.S. at 602. It is Federal law, not state law, that governs questions of the Board’s jurisdiction. *Id.* at 603.

Given that the record does not support a finding that PIAA is administered by individuals who are responsible to public officials or to the general electorate, PIAA does not meet either prong of the *Hawkins County* test. Accordingly, I conclude that PIAA is not a political subdivision, but an “employer” within the meaning of Section 2(2) of the Act and it is appropriate for the Board to assert jurisdiction in this matter.

B. PIAA Lacrosse Officials are “Employees,” Not Independent Contractors

In 1947, Congress amended the definition of “employee” in Section 2(3) of the Act to exclude certain specific categories of workers, including “any individual having the status of an independent contractor.” 29 U.S.C. Sec.152 (3). Thereafter, the Supreme Court firmly established a broad interpretation of the term “employee,” finding that it refers to individuals who work for others. *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-168 (1971). As the Supreme Court observed in *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91 (1995), the Board’s liberal interpretation of the word “employee” is “consistent with several of the Act’s purposes, such as protecting the right of employees to organize for mutual aid without employer interference and encouraging and protecting the collective-bargaining process.” In furtherance of the Act’s statutory objectives, the Board narrowly interprets

any exemptions from the Act's protection. *Boston Medical Center*, 330 NLRB 152, 160 (1999).

To differentiate between statutory employees and independent contractors, the Board, with court approval, has long applied agency principles derived from common law. Specifically, the Board utilizes the factors articulated in the Restatement (Second) of Agency, Sec. 220 (1958) ("Restatement"). *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 2 (Sept. 30, 2014). See also, *Roadway Package Systems, Inc.*, 326 NLRB 842, 849-50 (1998) (Board rejected the notion that the "right to control" was the predominant factor in analyzing independent contractor cases). Under these principles, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *FedEx*, 361 NLRB No. 55 at 2, citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968). In its recent decision in *FedEx*, supra, the Board acknowledged that the task of utilizing the common law principles to assess independent contractor status can be "challenging" and that the weight to be given a particular factor or factors depends on the circumstances of each case. *Id.*

The pertinent factors for analyzing independent contractor status, as set forth in the Restatement, are as follows: the extent of the employing entity's control over the manner and means of work; whether the individual is engaged in a distinct occupation; the kind of occupation the individual is engaged in and whether the work is done under the direction of the employer; the skill required in the particular occupation; whether the

employing entity or the individual supplies the instrumentalities, tools and place of work; the tenure of employment; the method of payment (by the job or by time); whether the parties believe they are creating an employment relationship; whether the work is part of the regular business of the employer; and whether the employer is in the business.

CSS Healthcare Services, Inc., 355 NLRB 33, 38 (2010); *Roadway Package. System*, supra.

The above list of considerations is “not exclusive or exhaustive.” *Slay Transportation Co., Inc.*, 331 NLRB 1292, 1293 (2000). Indeed, the Supreme Court has recognized that “there is no shorthand formula or magic phrase” that can be applied to determine whether an individual is an independent contractor or an employee. *The Big East Conference*, 282 NLRB 335 (1986), *affd.*, 836 F.2d 143 (3rd Cir. 1987), citing *United Insurance*, 290 U.S. at 258. The process for determining independent contractor status, then, is necessarily fact-specific.

The Board explained its analytical framework for deciding independent contractor cases in this way:

Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other. *Roadway*, 326 NLRB at 850. (Board found drivers to be employees, not independent contractors).

The party asserting the independent contractor status bears the burden of proof on the issue. *FedEx*, 361 NLRB No. 55 at slip op. 2. See also, *BKN, Inc.* 333 NLRB 143, 144 (2001).

Applying the Restatement factors to the facts of the instant case, I find that some weigh in favor of finding that the PIAA lacrosse officials are independent contractors and others weigh in favor of finding them to be statutory employees. Based on an examination of the Restatement principles within the “total factual context,” of this case, and for the reasons described below, I conclude that the balance of the evidence tips the scale in favor of employee status.

The Extent of PIAA’s Control over the PIAA Lacrosse Officials

With respect to the first factor, the extent to which the employer exercises control over the details of the work, I find that PIAA has far-reaching control over the officials’ manner and means of work. Indeed, PIAA, through its comprehensive Constitution and By-Laws, rules, regulations, policies, procedures and guidelines, dictates almost every aspect of the officials’ job. In this regard, from the moment of application until the moment of retirement, PIAA dictates how the officials’ job is to be acquired, performed and retained.

In order to become a PIAA lacrosse official, one must apply by using PIAA’s application mechanism, which includes mandatory testing. PIAA’s Executive Director has the power to reject any application. Thus, PIAA controls who may become a PIAA lacrosse official.

To be retained as a PIAA official, one must comply with strict PIAA policies requiring the following: affiliation with a PIAA chapter within 15 days of acceptance as an official; mandatory attendance at a minimum of six chapter meetings each year; mandatory attendance at an annual rules interpretation meeting; mandatory attendance at the PIAA Convention at least one time ever five years, if an official wishes to be considered for post-season officiating opportunities; uniform restrictions, including the requirement to carry a PIAA-issued badge; utilization of PIAA's assignment procedures; acceptance of the PIAA-established compensation scheme for payment during the regular season, pursuant to which representatives of member schools reach agreement with representatives of the officials concerning officials' rates; adherence to PIAA's Code of Ethics; mandatory submission of reports in the event of disqualifications; mandatory cooperation with inquiries from PIAA's executive staff and/or the District Committee concerning officials' conduct; unconditional acceptance of the dictated game schedule, including time and place, if the official wishes to work at a game; and unilaterally established fees for post-season game assignments.

PIAA additionally controls how the officials perform their job duties by requiring that they strictly follow the game rules set forth in the rules-book that the officials are required to use. PIAA reinforces these rules by issuing sport-specific "bulletins" to the officials. Significantly, PIAA has the ability to suspend, place on probation, or remove any official who fails to comply with PIAA's vast array of rules. PIAA also has the authority to abolish the PIAA Chapters, which are an integral part of the officials' job structure. In sum, PIAA controls virtually every aspect of the manner in which the

officials obtain and perform their work. Thus, the first Restatement factor weighs heavily in favor of finding the petitioned-for employees to be employees.

Whether PIAA Officials are Engaged in a Distinct Occupation

The second factor for consideration is whether the individual is engaged in a business that is distinct from the employer's business. *FedEx*, 361 NLRB at slip op. 2. In *FedEx*, the Board determined that this factor weighed in favor of finding package delivery drivers to be employees, rather than independent contractors, where they performed their jobs in the name of FedEx (uniforms, vehicle signs) and they utilized the employer's systems to carry out their job tasks (scanners).

Similarly, the petitioned-for PIAA officials are not performing their job functions as a separate business, but in furtherance of PIAA's operations. PIAA lacrosse officials are fully integrated into PIAA's operations, as their jobs involve the use of PIAA certification process, forms, emblems, rules, assignment mechanism and evaluation mechanism. When PIAA lacrosse officials take the field to perform their job duties, they do so in the name of PIAA, not in their own names. The lacrosse officials' work is core to PIAA's normal business operations; so much so that PIAA would not be able to function without the officials. See *United Insurance*, 390 U.S. at 258-259 (considering as one "decisive" factor that employees' functions were an "essential part of the company's operations"); *Slay Transportation*, 331 NLRB at 1294; and *Roadway Package Sys.*, 326 NLRB at 851. Compare, *PA Academy of Fine Arts*, 343 NLRB 846, 847 (2004) (Board found that the nature of art models' work was distinct from, and

tangential to, the employer's business of providing instruction to art students and weighed this factor in favor of independent contractor status).

The Officials' Entrepreneurial Opportunity for Gain or Loss

Relevant to the discussion of the "distinct occupation" question is the Board's recent focus in *FedEx* on the question of whether the petitioned-for individuals have a "significant entrepreneurial opportunity for gain or loss." *FedEx*, 361 NLRB at 10. The Board first noted that the "entrepreneurial opportunity" was but one of many factors to be considered, not *the* dispositive factor. Second, the Board in *FedEx* clarified that the individual's "entrepreneurial opportunity" must be actual, and not just theoretical. *Id.* Thus, the Board examines whether an individual has a realistic ability to work for other companies, a proprietary interest in his or her work, and control over important business decisions. *FedEx*, 361 NLRB at 12. See also, *Roadway Package Sys.*, 326 NLRB at 852 (employee status found, in part, because "unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management policies, and to be able to take financial risks in order to increase their profits").

Here, it is undisputed that the petitioned-for officials are free to decline assignments and that they are not restricted from officiating at games outside of Pennsylvania or at matches not sponsored by the PIAA. The Employer argues that these freedoms indicate significant entrepreneurial opportunity for the officials that would render them independent contractors. The Petitioner, on the other hand, argues that such opportunities are more theoretical than actual. Further, the Petitioner likens

the dues that officials are required to pay annually in order to continue refereeing at PIAA games to the “Business Support Package” that the FedEx drivers had the “option” of purchasing. But for the “Business Support Package,” the FedEx drivers could not perform their jobs for FedEx. Similarly, but for mandatory chapter affiliation and payment of PIAA dues, the petitioned-for lacrosse officials could not perform their PIAA jobs.

Notwithstanding the fact that the lacrosse officials are permitted to officiate at non-PIAA games and/or hold jobs that are entirely unrelated to PIAA sports, I find that the “distinct business” or “entrepreneurial opportunity” element weighs in favor of finding the officials to be employees rather than independent contractors. In reaching this conclusion, I note the following facts: the petitioned-for officials render their services not as part of their own enterprise(s), but on behalf of PIAA; they cannot hire others to perform their work for PIAA games; they have no control over when the regular season games and post-season games are scheduled; the scheduling requirements of PIAA-sponsored games significantly reduce the officials’ *actual* ability to provide lacrosse refereeing services elsewhere; lacrosse officials who wish to “sell” their services to other entities must leave the state to do so because PIAA is *the* entity that oversees interscholastic high school sports at private and public schools in Pennsylvania; and officials have no ability to demand that games be held at particular times and locations. See *FedEx*, 361 NLRB at slip op. 1, 3, and 10.

Nor is there evidence that the petitioned-for lacrosse officials have control over important business decisions of the nonprofit corporation. *Id.* at 15; *Roadway Package*

System, 326 NLRB at 852. Certainly, the PIAA lacrosse officials could not perform the same work for PIAA as *independent* suppliers of referee skills if they were not fully integrated into the PIAA system. Moreover, PIAA unilaterally drafts, promulgates and changes the contracts and other documents that it requires officials to use in the performance of their duties. *FedEx*, 361 NLRB at slip op. 10-11. All of these facts support a finding of employee status.

Whether the Officials Perform their Work under PIAA's Direction

The next Restatement factor examines the type of work in which the individual is engaged and whether the work is performed under the direction of the employer. PIAA lacrosse officials have no direct supervision on the playing field. Nevertheless, PIAA tightly controls the work that the officials perform through mandatory adherence to a plethora of rules and regulations, policies and procedures. In *FedEx*, the Board noted that "FedEx essentially directs their performance via the enforcement of rules and tracking mechanisms." *Id.* So, too, do the PIAA's rules constitute employer supervision.

Further, if requested by the District Committee or the executive staff, the officials must justify the way in which they performed any given task associated with their officiating assignments and compliance with PIAA rules. Officials are also evaluated on their job performances through a PIAA evaluation mechanism that can determine the frequency or quality of their future work with PIAA. For all of these reasons, I find that this factor weighs in favor of finding the petitioned-for lacrosse officials to be employees.

The Officials' Specialized Skills

With respect to the skills required for the particular occupation, the Board's decision in *The Big East*, supra, is generally instructive. In *The Big East*, the Board examined whether intercollegiate basketball officials were independent contractors, rather than employees within the meaning of the Act. Applying the common law principles of agency to the facts of that case, the Board noted that the basketball officials brought unique skills to their job assignments.

As in *The Big East*, the petitioned-for lacrosse officials already possess certain skills and sport-specific knowledge at the time they become PIAA officials. Indeed, applicants must be able to pass an exam in the sport before his or her application is accepted. The skill-related facts that the Board considered in *Big East*, however, differ from those in the case at hand in at least one significant way: While the basketball officials in *The Big East* obtained their training and certifications from an outside organization, PIAA provides the certification and ongoing training for the lacrosse officials whom the Petitioner seeks to represent. On the whole, then, I conclude that the "skills" factor weighs in favor of finding the lacrosse officials to be employees rather than independent contractors.

Who Supplies the Instrumentalities, Tools and Place of Work

The next area of inquiry is whether the employing entity or the individual supplies the instrumentalities, tools, and place of work. PIAA, through its agreements with member schools, provide the lacrosse officials' place of work. In this regard, the record establishes that member schools pay PIAA for its governance over school athletics and

that member schools make their playing fields available for use in the PIAA-sponsored games. Thus, the petitioned-for officials have no say in where they perform their PIAA work and they would not be able perform their work for PIAA at locations of their own choosing outside of the PIAA member-school network. This element weighs in favor of employee status.

PIAA lacrosse officials supply their own “tools” for use in performing their jobs, including a whistle, penalty markers, a timing device, a card and a pencil, all in accordance with PIAA’s rules and regulations. PIAA specifically dictates the color of the whistle (black).

The Petitioner argues that PIAA supplies officials with the “most necessary tool for officiating: authority.” While “[a]nyone can show up at a lacrosse game with a whistle,” posits the Petitioner, “the PIAA officials are listened to because PIAA has given them the authority to officiate PIAA contests.” Pet. Brf. at p. 47. The Petitioner’s novel argument that “authority” constitutes a “tool,” though interesting, lacks legal support. In sum, PIAA, through its agreements with member schools, provides the place where officials perform their work, but the officials provide the tools of the trade, as dictated by PIAA. In these circumstances, I find that this factor neither fully militates toward rendering the lacrosse officials “employees” nor “independent contractors.”

The Lacrosse Officials’ Employment Tenure with PIAA

Another consideration based on the Restatement factors is the length of time for which an individual is employed. In *FedEx*, the Board found that this factor weighed in favor of employee status where the drivers initially entered into one or two-year

agreements, which were automatically renewed for successive one-year periods as long as their work remained satisfactory. *FedEx*, 361 NLRB slip op. at 14. Compare, *PA Academy of the Fine Arts*, 343 NLRB at 847 (Board found no ongoing relationship that was indicative of employee status).

Applying the tenure factor to the instant case, the result is split between employee status and independent contractor status. In this regard, member schools' contracts with the officials are signed on a per-game basis, indicating a short tenure of employment. Officials have the ability to accept or reject PIAA work on a game-by-game basis, as well.

On the other hand, as in *FedEx*, the lacrosse officials have an expectation of continued employment with PIAA as long as they pay their annual dues and meet PIAA's other performance standards such as attendance at chapter meetings and rules interpretation meetings. The record further establishes that officials have continued to work for PIAA in this way for successive decades and there is no evidence that PIAA's employment relationship with the officials has a termination date. The fact that PIAA offers a re-registration discount to officials who pay their annual dues early, along with the fact that officials pay dues in January for the entire subsequent year, indicates PIAA's expectation that the lacrosse officials will continue to work as PIAA officials. Similarly, the fact that PIAA suspends officials for one year if they are delinquent in paying their dues suggests the official's anticipated return to the PIAA ranks at a subsequent time. Based on all of these facts, I find that the employment tenure factor is

not persuasive one way or the other in determining whether the petitioned-for lacrosse officials are employees under the Act or independent contractors.

The Officials' Compensation and Benefits

I now turn to the question of compensation and benefits. The petitioned-for lacrosse officials receive payment on a per-game basis. As mandated by PIAA's policies and procedures, member schools remit the payments directly to the officials during the regular season, while PIAA pays the officials for post-season games. The record suggests that the officials' compensation rates are the result of discussions between member schools' designated representatives (the athletic directors) and the officials' designated representatives (chapter chairpersons or Officials' Representatives to the District Committees and the PIAA Board of Directors).⁴¹ Officials who do not wish to accept the designated fee for any given game may reject the assignment.⁴² No deductions are made from the officials' pay for taxes or Social Security. Officials receive the same amount of pay for a game regardless of the time required to complete that assignment. Officials are not able to shorten the duration of a game assignment, or to lengthen it, but must work within the time frames established by the PIAA rules for the sport.

⁴¹ The record contains reference to an incident in which PIAA's Assistant Executive Director allegedly "threatened" to suspend officials in the District VII boys lacrosse chapter for refusing to agree to a fee that member schools' athletic directors proposed. I find that there is insufficient reliable evidence in the record to make a determination on this issue and I do not reach a conclusion that officials' regular season pay rates are, in effect, unilaterally established by PIAA.

⁴² While it appears that the Assignors may play some role in establishing fees on a per-game basis, the record evidence is unclear on this point. Notably, neither party presented an Assignor to testify at the hearing.

PIAA provides officials with liability insurance, excess accident medical insurance, and death and dismemberment insurance. PIAA does not offer to its officials any regular medical insurance. Nor do the officials receive compensation for vacations, sick leave, personal days or holidays.

In theory, PIAA officials have the ability to increase the money they earn through PIAA-sponsored events by indicating through the Arbiter system that they are available for assignments and by accepting assignments if the Assignors select them for games. Conversely, officials can lessen their PIAA-based income by closing out dates on the Arbiter systems prior to the lacrosse season and/or by declining assignments from the Assignors. To some unknown extent, however, the practical ability of the officials to affect their own income may be diminished if the Assignors avoid assigning games to certain officials and direct refereeing opportunities to other officials.⁴³

The Board has traditionally found that compensation made on a per-job basis militates toward independent contractor status, while compensation based on an hourly rate weighs in favor of employee status. *Porter Drywall*, 362 NLRB No. 6, slip op. at 4 (January 29, 2015); *Roadway Package System*, 326 NLRB at 852. Similarly, the provision of insurance and other benefits has been a factor in finding employee status, while the absence of those benefits tends to contribute to a finding of independent contractor status. *FedEx*, 361 NLRB No. 55, slip op. at 14.

⁴³ Again, no Assignor testified at the hearing and other witnesses failed to fully explain the role of the Assignors and any impact that the Assignors' practices has on the officials' ability to earn more or less money. Based on the record, I am unable to conclusively determine the authorities possessed and exercised by the Assignors.

Here, however, the fact that PIAA establishes and enforces the compensation scheme in which the member schools and officials operate greatly diminishes the significance of the fact that member schools issue the paychecks to the officials for their work during the regular season. PIAA, through its By-Laws and other rules and regulations, controls the manner in which officials will be compensated during the regular season. Specifically, when member schools join and pay their dues to the PIAA, they agree to work within the framework that PIAA dictates in its Constitution, By-Laws, Policies and Procedures and Rules and Regulations. Thus, when the member schools directly compensate the officials during the regular season, they act at the behest of the PIAA. Further, during the post-season, PIAA directly compensates the officials based on fees that it unilaterally establishes. In these circumstances, I find that the compensation and benefits factor weighs in favor of finding the petitioned-for lacrosse officials to be employees under the Act.

Whether the Officials and PIAA are in a Master-Servant Relationship

Another of the Restatement factors examines whether the individual and the employing entity believe that they are creating a “master-servant” relationship. *FedEx*, 361 NLRB slip op. 2. As was the case in *The Big East*, supra, PIAA provides the lacrosse officials with multiple documents declaring that the referees are independent contractors, not employees. These include the PIAA officials’ application, contracts that PIAA provides to member schools and requires officials to sign in order to be paid, and the identification cards that PIAA requires officials to carry. It goes without saying, then, PIAA seeks to avoid a master-servant relationship with the officials. It is also evident,

by the very filing of the petition in this matter, that the Petitioner has a contrary position and sees the lacrosse officials as employees, not independent contractors.

The Board considered similar facts in its recent *FedEx* decision. In that matter, like here, FedEx provided its drivers with various documents declaring the drivers to be independent contractors. As in this case, the FedEx drivers were required to use the documents bearing the “independent contractor” designation. The Board noted, however, that the drivers had not been given an opportunity to negotiate with the employer concerning use of the term “independent contractor” on FedEx documents.

Here, PIAA officials are required to utilize PIAA-issued documents that bear the “independent contractor” designation, including application forms, the identification cards and the contracts they must execute in order to be paid. There is also no evidence to suggest that the PIAA ever consulted its officials about its use of the “independent contractor” designation, or gave the officials an opportunity to negotiate over whether the designation should be included on the materials.

In these circumstances, as in *FedEx*, PIAA acts as the “master” by requiring the officials to utilize materials that declare them to be independent contractors. Their use of these documents does not, therefore, establish that the officials view themselves as independent contractors. Nor is PIAA’s consistent characterization of the officials as independent contractors on its documents determinative of the ultimate question. In these circumstances I find that the “master-servant” factor set forth in the Restatement neither weighs in favor of finding the officials to be independent contractors, nor against it.

**Whether the Officials' Work is Part of PIAA's Business and Whether
the Officials and PIAA are in the Same Business**

The final two Restatement factors, whether the individual's work is part of the employer's regular business, and whether the employer is the same business as the individual, both weigh in favor of finding the PIAA lacrosse officials to be employees. As to the first consideration, the record establishes that PIAA could not perform its business operations without the work of its officials. Indeed, a pool of qualified and certified lacrosse officials is one of the primary services that PIAA provides to its member schools. Additionally, PIAA's very organizational structure is based, in part, on its officials and the chapters and Districts to which they belong. If the PIAA officials were removed from PIAA's operations, the business would be unable to function in its present incarnation. I conclude, therefore, that this factor fully supports a finding of employee status. See *Lancaster Symphony Orchestra*, 357 NLRB No. 152 (2011) (Contrary to the Regional Director, the Board determined that orchestra musicians were employees, not independent contractors, and noted that the musician's work is part of the employer's business of performing music).

Similarly, the record evidence establishes that the petitioned-for lacrosse officials and the Employer are in the same business. PIAA is engaged in the business of providing a system of fair play in interscholastic sports. In performing their referee duties, lacrosse officials are engaged in the identical business. Thus, both of these

factors distinctly weigh in favor of finding that that the officials are in an employer-employee relationship and not acting as independent contractors.

Having carefully considered all of the record evidence and having applied current Board law to those facts, I find that the evidence as a whole establishes that the petitioned-for lacrosse officials are not independent contractors, but are employees within the meaning of Section 2(3) of the Act. I recognize that the Board reached a contrary conclusion in *The Big East*, the sole existing Board decision involving non-professional sports officials. However, the evidence that the Board considered in *The Big East* is distinguishable from the present case in several respects. For example, in that matter, the game officials received their training and certifications from an outside organization, while here it is the PIAA that controls the lacrosse officials' training and certifications. Similarly, in *The Big East*, the basketball officials at issue remitted dues to a separate entity, the Eastern College Basketball Association, and their dues were variable depending on the number of assignments they received. In contrast, the PIAA lacrosse officials send their dues directly to the PIAA and the amount owed is not dependent upon the amount of work the officials perform.

I find that the Board's recent decision in *FedEx*, issued almost 30 years after *The Big East*, is more instructive. The Board in *FedEx* specifically declared that its intent in that decision was to "restate and refine the Board's approach" to analyzing independent contractor cases. Thus, notwithstanding PIAA's contentions to the contrary, *The Big East* decision is not controlling in this case.

In reaching the conclusion that the lacrosse officials are employees, not independent contractors, I acknowledge that several factors weigh in favor of declaring them to be independent contractors. Primary among these are the fact that during the regular season, member schools pay the officials for their work on a per-game basis, at a rate apparently negotiated between representatives of the schools and representatives of the officials, albeit within a compensation scheme that PIAA established; the fact that officials may reject assignments without repercussion during the regular season and they may reject assignments during the post-season, with the only consequence being a chance that PIAA may not select them for subsequent playoff games; officials may, and do, seek outside employment; officials' compensation does not include withholdings for taxes or Social Security; officials may theoretically affect their compensation by accepting or rejecting games (depending on the role that the Assignor plays in distributing work); officials bring specialized skills to their job; and they supply their own uniforms and equipment, albeit according to PIAA's mandate.

Balanced against above facts, however, is evidence that PIAA controls all other aspects of the lacrosse officials' employment with PIAA. In this regard, during both the regular season and the post-season, PIAA: dictates the manner in which individuals apply to become PIAA officials; dictates the testing mechanisms necessary for their certifications; provides training in support of both the testing requirements and the performance of their job duties; has the authority to reject individuals' applications; mandates attendance at six chapter meetings per season (which is only seven weeks long); mandates attendance at rules interpretation meetings; grants to the PIAA

Executive Director exclusive authority to “excuse” officials’ failure to meet the attendance requirements; supplies all documents that officials use to perform their jobs; dictates the component parts of the officials’ uniforms; restricts what the officials may wear or do while officiating (e.g., by prohibiting them from wearing jewelry, using tobacco, or chewing gum); controls the hours during which officials perform their job duties; controls, through agreements with the member schools, the places where the officials perform their work; creates and utilizes an evaluation system, through which coaches, athletic directors, and other officials assess the officials’ job performance; establishes the compensation scheme that requires member schools to pay officials directly for their services; determines the rules that officials must follow in carrying out their job duties; requires officials to submit written reports to PIAA in the event they use their professional judgment to disqualify someone from a contest; requires officials to answer inquiries from PIAA concerning complaints about their job performances; has the authority to suspend, remove or place on probation officials who violate PIAA rules and regulations, policies and procedures, and/or PIAA’s Constitution and By-Laws; controls transfers between and among chapters of officials; limits the number of chapters to which officials may belong; grants to the Executive Director the right to deny or extend an official’s “inactive” status; requires chapter secretaries to submit reports to the executive office concerning game assignments, though the chapters are comprised entirely of officials; has authority to reinstate officials whom it previously removed; and has the authority to affix penalties for violations of its Constitution and rules, including requiring the payment of late fees when officials are delinquent in submitting their

annual registration renewals. Further, the petitioned-for lacrosse officials are an integral part of PIAA's business operations; without the officials, the PIAA would not be able to function.

During the post-season, PIAA's role as "master" over the "servant" officials is even more striking, as PIAA demonstrates authority in the following areas, in addition to those described above: PIAA sets the schedule for the playoff games, thereby determining the officials' schedules during the post-season; assigns, through the executive staff, all officials for post-season games; requires officials to attend the PIAA Convention at least once every five years in order to be eligible to officiate in post-season games; unilaterally establishes the fees that officials may charge for post-season game assignments; affects individual officials' compensation by assigning them to more or fewer post-season games; evaluates officials on their job performances during the post-season; and directly pays officials for the work they perform during the post-season.

As Administrative Law Judge Robert A. Giannasi observed when writing his decision that the Board adopted in *The Big East*, "this case is not unlike most in this area that present very close mixed questions of law and fact. Different adjudicators can look at the same facts and come to different results." *The Big East*, 282 NLRB at 345. Here, I have carefully examined the record evidence and applicable law and I conclude that the scales are tipped in favor of finding the petitioned-for lacrosse officials to be employees, not independent contractors. Having determined that the Board has jurisdiction over PIAA under Section 2(2) of the Act and that the lacrosse officials are

“employees” within the meaning of Section 2(3) of the Act, I now address the question of voter eligibility.

C. The Appropriateness of the Unit and a Voter Eligibility Formula

The Employer further argues that the petition in this matter should be dismissed based on its claim that there is no valid question concerning representation here because “the officiating season is so brief, includes so few officiating opportunities, and has in fact already expired until the Spring of 2016.” PIAA Brf. at p. 45. More particularly, PIAA contends that the petitioned-for officials “do not constitute ‘regular part-time employees’ who may be certified as an appropriate bargaining unit or as part of an appropriate bargaining unit.”⁴⁴ In support of its position, PIAA cites record testimony that the petitioned-for lacrosse officials worked an average of 14 to 20 games each during the 2015 regular season and evidence that the District VII lacrosse officials received 12 post-season assignments (six for the girls lacrosse officials and six for the boys lacrosse officials).⁴⁵

In the absence of Board authority to support its position that the petition for lacrosse officials should be dismissed based on the amount of time in which they perform their duties, the Employer likens this case to those involving “contracting units.” I find that the circumstances of the present case are entirely distinguishable from those in *Fraser-Brace Engineering Co.*, 38 NLRB 1263 (1942), on which PIAA relies in its

⁴⁴ Consistent with this position, PIAA submitted to the Regional Director a list of all current PIAA officials, but characterized the entire list as those officials whom PIAA contends should be excluded from any appropriate unit. The record contains no payroll records or other documentary evidence reflecting the actual hours or number of games that each of the petitioned-for officials worked in the past, including in the 2015 season.

⁴⁵ PIAA executives selected the remainder of the post-season officials from chapters in other districts across the state.

post-hearing brief. PIAA Brf. at p. 44. In *Fraser-Brace*, the Board dismissed a petition because the construction project on which the petitioned-for employees was nearing its end. Here, not only is there no indication that the annual PIAA lacrosse season will be canceled, the record includes evidence that in 2012, PIAA member schools proposed wage rates for the officials that would extend through the 2017 lacrosse season. Thus, Board precedent concerning “contracting units” has no place in this discussion.

Similarly, PIAA’s reliance on the Board’s decision in *MGM Studios*, 336 NLRB 1255 (2001) is misplaced, where the Board in that case held that it would not direct an election unless “the present work complement was substantial and representative of the ultimate complement to be employed in the near future.” Record evidence indicates that the lacrosse officials whom the Employer identified as having officiated at PIAA games in the 2015 season will continue to officiate at PIAA lacrosse games in the next season as long as they pay their annual dues and meet PIAA’s other requirements for membership. The Employer, who seeks to exclude all PIAA lacrosse officials from eligibility for voting, failed to present any evidence that the individuals it identified as the 2015 PIAA lacrosse officials will no longer be officiating at PIAA games in 2016. To the contrary, the record suggests that a majority of the existing PIAA lacrosse officials return to their posts year after year.

Other than its contention that the District VII and VIII lacrosse officials work with insufficient frequency to constitute “regular part-time employees,” and its contention that an election in the proposed unit would be improper because the 2015 lacrosse season

has ended and the petitioned-for officials will not referee at PIAA lacrosse games until 2016, PIAA has raised no issues as to the scope or composition of the unit.

Contrary to the Employer, the Petitioner asserts that the boys and girls lacrosse officials in PIAA Districts VII and VIII “are eligible for inclusion within a bargaining unit comprised solely of themselves, because they are all regular, part-time, seasonal employees.” Petitioner’s Brf. at 58. In support of this position, the Petitioner relies on the Board’s decision in *Tol-Pac, Inc.*, 128 NLRB 1439 (1960). In that matter, the employer requested dismissal of the petition on the grounds that, at the time of the petition, the employer only employed two of the laborers whom the union sought to represent, that they were both supervisors and that the proposed unit was inappropriate because the laborers’ work was “sporadic and uncertain.” The Board observed that the petitioned-for laborers had a common interest in their ability to work on an as-needed basis and to be compensated on the basis of availability. This fact, coupled with the laborers’ reasonable expectation of returning to work for their employer, led the Board to conclude that the laborers were a unit of regular part-time employees, not casual employees. *Tol-Pac*, 128 NLRB at 1440. The Petitioner is correct that the Board takes into consideration such factors as regularity and continuity of employment, tenure of employment, similarity of work duties and similarity of wages in determining whether one is a regular part-time employee versus a casual employee. See, e.g., *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 819 (2003) (Board found that a newly hired employee worked a sufficient amount of time prior to the election to be a “regular part-time employee”). However, this is not the issue before me, as neither party claims that

the petitioned-for lacrosse officials are “casual” employees within the meaning of the Act.

Based on the overall record, I conclude that the petitioned-for employees constitute an appropriate unit of seasonal employees. The Board has long upheld certifications of units that include seasonal employees, whether as part of a larger unit of regular employees, or as a unit comprised only of those who work according to the seasons. See, e.g., *SFOG Acquisition Co., LLC*, 333 NLRB 662 (2001) (Board found that an amusement park’s seasonal employees had a sufficient expectation of recall to be included in the bargaining unit); *Bogus Basin Recreation Assn.*, 212 NLRB 833 (1974) (Board found unit of ski resort employees was appropriate, though they only worked during the snowy portions of the year); and *Baumer Foods, Inc.* 190 NLRB 690, 690 (1971) (Board included seasonal employees in production and maintenance unit where many of the same seasonal employees returned to the workforce each year and thus “had a reasonable expectation of substantial seasonal employment from year to year”).

In deciding whether seasonal employees are eligible voters, the Board assesses their expectation of future employment. Factors that the Board considers in finding employees to be regular seasonal employees include the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the employer's recall or preference policy regarding seasonal employees. Temporary or casual seasonal employees are ineligible. *Macy’s East*, 327

NLRB 73, 73 (1998), citing *Main Apple Growers*, 254 NLRB 501, 502 (1981). *Flat Rate Movers Ltd.*, 357 NLRB No. 112 (2011) (Board sustained challenges of a moving company's seasonal employees who had no reasonable expectation of future employment based on their immigration status); See also, *L & B Cooling*, 267 NLRB 1, 2-3 (1983) (*extra* migrant farm workers, as compared to regular seasonal farm workers, had no reasonable expectation of future employment with the employer due to their migratory nature); and *Baumer Foods*, *supra*. See also, *Post Houses*, 161 NLRB 1159, 1172–1173 (1966) (Restaurant's student employees were excluded as casual seasonal employees where they had no expectation of future employment and none of the students returned to work for the employer from one year to the next).

Applying the Board's analytical factors for determining the status of seasonal employees to the evidence in the case before me, I find that the petitioned-for lacrosse officials constitute seasonal employees who are entitled to determine whether they wish to be represented for the purposes of collective-bargaining. First, as described above, the record establishes that the petitioned-for lacrosse officials come from a "labor force" that is entirely comprised of individuals who apply to, are tested by, and registered with PIAA. Second, with respect to the "stability of the employer's labor requirements," the record reveals no evidence that PIAA intends to dispose of its lacrosse program. To the contrary, the member schools' proposed dues' structure for officials contemplates a continuation of that program into the future.

The third factor that the Board utilizes in assessing the status of seasonal employees, the extent to which the employer is dependent upon the seasonal labor, is

perhaps the most striking in the instant case. Specifically, PIAA relies entirely on the petitioned-for lacrosse officials for PIAA's successful sponsorship of PIAA lacrosse games. But for the PIAA lacrosse officials whom the Petitioner seeks to represent, PIAA lacrosse operations could not be carried out, as required by its Constitution and By-Laws.

The Board's fourth factor for analyzing the officials' status as seasonal employees is the extent to which PIAA re-employs the petitioned-for officials. As described above, PIAA places no limitation on the number of seasons or years that officials may return to officiate at PIAA lacrosse games.⁴⁶ As long as the lacrosse officials remit their annual dues to PIAA and adhere to PIAA's rules, the petitioned-for officials are included in PIAA's officiating work force. In the event that an official fails to pay his or her dues in a timely manner, PIAA suspends that official for a period of one year. It does not expel them permanently. This indicates an expectation that the official will return to officiating for PIAA once the suspension has been served.

Finally, when evaluating whether individuals are regular seasonal employees, the Board examines the employer's recall or preference policies. *Macy's East*, 327 NLRB at 73. Here, any lacrosse official who has paid his or her annual dues to PIAA and who follows PIAA's rules is eligible for recall as an official. During the regular lacrosse season, the Assignors use PIAA's list of eligible officials to make game assignments and PIAA's executive staff uses that same list to assign games during the post-season.

⁴⁶ At the hearing in this matter, two of the current PIAA lacrosse officials testified that they have worked for PIAA for 15 and 17 consecutive years, respectively. These numbers of years clearly include sports other than lacrosse, as PIAA did not recognize lacrosse as a sport until 2009. Nevertheless, these witnesses have officiated for PIAA lacrosse games in consecutive years for at least the past six years.

PIAA-registered lacrosse officials in Districts VII and VIII work an average of 14 to 20 games during the regular season. There are also 12 post-season assignments available to the same group of officials. Based on all of the foregoing, I find that the record supports a conclusion that the petitioned-for lacrosse officials in Districts VII and VIII have a sufficiently reasonable expectation of re-employment with PIAA that they qualify as seasonal employees.

In addition to being seasonal in nature, PIAA's officiating services constitute a specialized industry that requires an alternative eligibility formula for voting. In such nontraditional industries, the Board has approved eligibility formulas that take into account various peculiarities of employment including employees who may not work for extended, uninterrupted periods of time. The purpose of alternative eligibility formulas in specialized industries is "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), *enfd.* 2 F.3d 35 (3rd Cir. 1993). Absent the use of nontraditional eligibility formulas, employees in those industries with short-term and sporadic employment patterns who by "happenstance are not currently employed but who have a reasonable expectancy of further employment" would lose the right to be represented under the Act. *American Zoetrope Productions*, 207 NLRB 621, 623 (1973) (Employees in the entertainment industry who worked in two productions in a one-year period were deemed eligible to vote).

The Board has found that “special circumstances” warranting alternative eligibility formulas include irregular employment patterns such as intermittent employment. *Id.* See also, *The Julliard School*, 208 NLRB 153 (1974) (Employees were eligible to vote where they had worked on two productions for a total of five days over a one-year period or at least 15 days over a two-year period) and *DIC Entertainment, L.P.*, 328 NLRB 660 (1999). (Employees who worked in two productions totaling 5 days in a single year or at least 15 days over a one-year period were eligible to vote). In the specialized theater industry, for example, the Board has focused on the length and number of “relevant productions” when fashioning an eligibility formula. *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28, slip op. 10 (2010) (Board noted that the Act contains no provision for excluding intermittent workers from its coverage and applied *The Julliard School* eligibility formula to the petitioned-for group of musicians who work intermittently for a theatrical employer). See also, *Greenhorne & O’Mara, Inc.*, 326 NLRB 514 (1998) (Board reinstated dismissed petition and remanded case for Regional Director’s establishment of an appropriate eligibility formula for archaeological technicians, noting that the fact that many of the employees were hired solely for the duration particular projects that lasted anywhere from two to five days, to five weeks, does not warrant their exclusion as “temporaries”).

The present case clearly presents special circumstances that warrant a nontraditional formula for establishing voter eligibility. Unlike employees in a traditional manufacturing facility or in the service industry, PIAA lacrosse officials perform their work for PIAA during a specifically designated period that lasts seven to 10 weeks per

year. Noting that the Board has not sanctioned any specific eligibility formula for interscholastic sports officials, and that neither party herein has proposed such a formula, I find that the petitioned-for PIAA lacrosse officials' employment pattern, both in terms of length and duration, is most akin to that of employees in the entertainment industry. In this regard, the officials' work is characterized by a designated period of "performances," with long spans of time during which they do not officiate at PIAA lacrosse games. Further, as described above, the PIAA lacrosse officials enjoy an expectation of re-employment with the Employer on a seasonal basis.

Given the length of the playing season in PIAA-sponsored lacrosse, and the frequency with which the PIAA officials refereed during the 2015 lacrosse season, I have fashioned a formula that comports with the Board's recognition that otherwise eligible employees who work on an intermittent basis are entitled to seek and secure union representation under the Act. *Kansas City Repertory Theatre*, 356 NLRB No. 28 at slip op. 10. Thus, I have determined that officials who officiated at three or more PIAA-sponsored lacrosse games during the 2015 regular and/or post-season, or at a total of six or more games during the 2014 and 2015 regular and/or post-seasons combined, will be eligible to vote in the election directed herein.

D. Timing of the Election

Generally, Board policy is to direct elections involving seasonal employees at or near the peak of the season in order to provide as many voters as possible with the opportunity to cast their ballots. *Bogus Basin Recreation Assn.*, supra. See also, *Libby, McNeill & Libby*, 90 NLRB 279, 281 (1950) and *Brooksville Citrus Growers Assn.*, 112

NLRB 707 (1955). Although such elections usually involve manual balloting, they are also appropriate for mail ballot elections in situations where, as here, a substantial number of voters may be located elsewhere during the off-season. *Saltwater, Inc.*, 324 NLRB 343 (1997). Similarly, the Board has recognized that in some circumstances, alternative timing of an election among seasonal employees is warranted. See, e.g., *Aspen Skiing Corp.*, 143 NLRB 707 (1963) (Election directed in July, even where ski season would not resume until November, based on high rate of reemployment during ski season and retention of 14 employees in the summer).

PIAA urges that any election ordered herein be held at, or near, the seasonal peak of employment, while the Petitioner contends that a mail ballot election should be directed to commence within 10 days of this Decision and Direction of Election. In choosing an appropriate election date, the Board attempts to balance the impact of any voting delay on the employees' exercise of their right to select or reject a bargaining representative with facilitating that right for the greatest number of employees. I find that in the instant case, this balance is best met by scheduling a mail ballot election to commence approximately three weeks following the issuance of this Decision and Direction of Election.⁴⁷ The timing of the election takes into consideration the fact that while the petitioned-for lacrosse officials are not currently engaged in refereeing at PIAA lacrosse games, they may be officiating at other competitions elsewhere in the country. I find that the opportunity for enfranchisement is enhanced by scheduling the mail ballot

⁴⁷ I have concluded that a mail ballot election is most appropriate because the petitioned-for employees do not report to any particular facility on a regular basis.

election to commence at a time when the petitioned-for officials are more likely to have returned to their homes after the summer, in connection with the start of PIAA's fall season sports.⁴⁸ I note, as well, that the short, three-week delay in commencement of the mail ballot election will have little or no impact on the employees, who are not currently officiating at PIAA-sponsored lacrosse games. *Bogus Basin Recreation*, 212 NLRB at 833.

III. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.
3. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All registered sports officials employed by Pennsylvania Interscholastic Athletic Association ("PIAA") who officiate at PIAA-sponsored boys and girls lacrosse games in the geographic areas of Pennsylvania designated as "District VII" and "District VIII" by the PIAA Constitution; excluding all

⁴⁸ As previously noted, the record reveals that many the petitioned-for lacrosse officials also officiate for other PIAA sports competitions.

office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

Because I conclude that the above unit is appropriate for collective bargaining and that a question of representation exists under Section 9(c) of the Act, I am directing an election in this matter, as follows.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Office and Professional Employees International Union.

A. Election Details

The election will be conducted by mail. The National Labor Relations Board, Region Six, will mail secret ballots to the employees employed in the above-described unit by 5:00 p.m. on Monday, August 24, 2015, from the Regional Office located at the William S. Moorhead Federal Building, 1000 Liberty Avenue, Room 904, Pittsburgh, PA 15222. A stamped return envelope will be included with each ballot. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots to the Region Six office by close of business on Monday, September 14, 2015. All mail ballots will be commingled and counted at

the Region Six office on Tuesday, September 15, 2015, at 10:00 a.m. or at such other time that the Regional Director determines following consultation with the parties.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Six office by no later than 5:00 p.m. on August 31, 2015, in order to arrange for a duplicate mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those individuals who officiated at three or more PIAA-sponsored lacrosse games during the 2015 regular and/or post-season, or at a total of six or more games during the 2014 and 2015 regular and/or post-seasons combined, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or

reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(I) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by Monday, August 3, 2015. The list must be accompanied by a certificate of service showing service on all parties. The Region will no longer serve the voter list.

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list

is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Election Notices

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision and Direction of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election

electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to the day the election begins. The election will be deemed to have begun on Monday, August 24, 2015, the date the ballots are mailed from the Regional Office. Therefore, the Notices must be posted prior to 12:01 a.m. on Wednesday, August 19, 2015, and copies must remain posted until the end of the election. For purposes of posting, "working day" means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

V. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: July 30, 2015



Nancy Wilson
Regional Director
National Labor Relations Board
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Pittsburgh, PA 15222-4111